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No. 94-8729

In The

Supreme Court of the United States

October Term, 1995

TINA B. BENNIS,

Petitioner,

v.

STATE OF MICHIGAN ex rel.
WAYNE COUNTY PROSECUTOR,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of Michigan

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The briefs filed by the State of Michigan and the United States, as one of its supporting *amici*, take contrasting positions regarding the existence of any constitutional limits to forfeiture of the property of blameless persons. The State of Michigan, arguing by analogy to statutes establishing "vicarious liability" in civil tort actions, contends that truly innocent owners are entitled to no protection whatsoever by the Constitution. The analogy to civil "vicarious liability" statutes is fundamentally flawed and cannot support the State's position.

The United States, on the other hand, acknowledges that blameless persons are protected from forfeiture under the Due Process and Takings Clauses,[1] but disagrees with Tina Bennis regarding the standard for determining innocence or culpability, the allocation of the burden of proof on that issue, and the application of the appropriate standard to the facts of this case. The United States believes that an owner's culpability should be determined under the "all reasonable steps" standard, rather than the negligent entrustment standard advocated by petitioner and suggested by the Court's historical analysis in *Austin v. United States*, 113 S. Ct. 2801 (1993). The United States argues that the owner must bear the burden of proving lack of culpability, and contends that Tina Bennis did not sustain that burden here under either standard.

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[1] The United States, while emphasizing the due process underpinnings for the constitutional protection for truly innocent owners, suggests that analysis under the Takings Clause "does not appear to add anything to the constitutional analysis in this context," thereby implying that the constitutional rule can be derived from that Clause as well. (U.S. Br. 15 n.6).

Because the evidence below establishes unquestionably that Tina Bennis neither knew nor should have known of the illegal use, she would prevail under either the "all reasonable steps" or the negligent entrustment standard. However, she urges this Court to reject the "all reasonable steps" standard advocated by the United States in favor of the negligent entrustment standard as the basis for determining the constitutionally required culpability in civil forfeiture proceedings. Because of its vagueness, the "all reasonable steps" culpability standard has led to widely divergent innocent owner determinations in federal and state cases, and to arbitrary forfeitures of property. Indeed, the position taken by the United States with respect to Tina Bennis betrays the fundamental deficiencies of the standard. Negligent entrustment as a standard of culpability is clearer and more realistic than "all reasonable steps" and is far less susceptible to being applied in a way that subjects blameless property owners to forfeiture.

The United States' contention that Tina Bennis should not prevail depends entirely on its position that she had the burden of proof with respect to culpability, thereby demonstrating the inextricable interdependency between a substantive standard of culpability and the allocation of the burden with respect to that standard. Therefore, the Court is asked to reach the burden issue and rule that, under both the Due Process Clause and the Takings Clause, the State bears the burden of proving the constitutionally required culpability in civil forfeiture proceedings.

ARGUMENT

A. The Arguments Against The Recognition Of Constitutional Protection For Truly Innocent Owners Made By The State Of Michigan And *Amicus Curiae* American Alliance Are Without Merit

The State of Michigan's brief ignores both the recognition in the *Calero-Toledo* dicta that the Constitution protects blameless individuals from forfeiture of their property, and the conclusion in *Austin* that forfeiture has traditionally been understood as punishment for personal culpability in negligently entrusting property. In arguing against recognition of a constitutional protection for wholly innocent persons, the State focuses primarily on state statutes that, in derogation of common law, create vicarious liability for automobile owners in personal injury actions. (Respondent's Brief at 45-52). The State appears to argue that, because the constitutionality of such statutes has been taken for granted, it follows that the Constitution affords blameless owners no protection from forfeiture. That argument is without merit.[2]

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[2] The State of Michigan also analogizes by reference to so-called "public welfare" criminal statutes (Mich. Br. 39-41), a class of statutory offenses defined earlier in this century that "[did] not fit neatly into any of . . . [the] accepted classifications of common law offenses, such as those against the state, the person, property, or public morals." *Morissette v. United States*, 342 U.S. 246, 255 (1952). A defendant charged with the commission of such a crime can be found liable even if he lacks *mens rea* – that is, is unaware of "the facts that make his conduct" satisfy an element of the offense. *Staples v. United States*, 114 S. Ct. 1793, 1798 n.3 (1994). But this Court's implicit acknowledgement of the constitutionality of particular public welfare offenses is in no respect inconsistent with a constitutional prohibition against forfeiting the property of blameless persons like Tina Bennis here. For unlike public welfare offenses, the criminal law

The class of statutes to which respondent refers make automobile owners vicariously liable to private plaintiffs in tort actions for injuries caused by persons who were driving the automobile with the owner's consent. Because of the very significant difference in purpose between forfeiture statutes and statutes that facilitate recovery of damages in private litigation, this analogy is inapposite. The automobile owner liability statutes do not authorize the imposition of punishment, as do the forfeiture provisions of the nuisance abatement act, but instead shift the incidence of a personal injury plaintiff's loss to assist him in recovering for that loss. Since the purpose of these statutes is not "punitive," as are forfeiture statutes, due process questions are not raised. And because the State does not stand to benefit in a pecuniary sense from the operation of these automobile owner liability statutes, the statutes raise no takings issues. *Cf. United States v. James Daniel Good Real Property*, 114 S. Ct. 492, 502 (1993) ("[I]t makes sense to scrutinize governmental action more closely when the State stands to benefit") (citation and internal quotation marks omitted).

Nor has respondent cited to any common law precedent for imposing punitive vicarious liability on one

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offenses such as prostitution that trigger forfeiture under the Michigan statute belong to a long-established common law tradition of offenses against "the state, the person, property, or public morals." Furthermore, public welfare statutes have been construed to impose only a *limited form of strict liability*, *Staples*, 114 S. Ct. at 1798 n.3, on a person who commits an act or omission constituting a criminal offense. As construed by the Michigan Supreme Court, the forfeiture provisions of the Michigan statute, by contrast, punish one person vicariously for the criminal acts of another – or, as in this case, for the criminal acts of a number of persons who collectively created the "nuisance condition" – in the absence of any knowledge on the part of the innocent owner that those acts will take place.

spouse for the acts of another spouse. Consistent with the position of the United States, petitioner is aware of "no common law tradition that would support the imposition of punitive liability on a spouse based solely on the actions of a partner." (U.S. Br. 21).[3]

The *amicus* brief of the American Alliance for Rights and Responsibilities ("American Alliance") does not address petitioner's argument for recognition of a due process-based protection for innocent owners. It does, however, argue against recognition of such protection under the Takings Clause by making the unsupported assertion that "[c]ivil forfeiture has long been a background principle[ ] of the State's law of property and nuisance already place[d] upon . . . ownership." (A.A.R.R. Br. 17) (internal quotation marks omitted) (citing to *Lucas v. South Carolina Coastal Council*, 112 S.Ct. 2886, 2900 (1992)). To the extent *amicus curiae* is suggesting that forfeiture of a truly innocent person's property in this factual context has been a "background principle" of the law of "property and nuisance," the statement is incorrect. First, it ignores the historical analysis in *Austin* that civil forfeiture has consistently been understood as

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[3] The constitutionality of vicarious criminal liability has never been directly addressed by this Court in any context. Contrary to the United States' suggestion, the Court in *United States v. Park*, 421 U.S. 658 (1975) did not "uph[o]ld strict, vicarious criminal liability for a corporate officer based on his company's conduct . . . " (U.S. Br. 14-15) . Instead, the Court in *Park* made clear that the liability of a corporate officer for wrongful acts of a corporation was based on "an omission or failure to act" by that officer who "had the power to prevent the act complained of." 421 U.S. at 671. Because the criminal liability in *Park* was based on the officer's own, rather than an imputed, "omission or failure to act," and because it depended in part on whether the officer could have prevented the harm, the criminal liability was not "vicarious" in nature.

punishment for personal culpability. *Austin*, 113 S. Ct. at 2808-10. Second, it disregards the limits to nuisance abatement – both as to liability and remedy – that existed (and still exist) at common law that would have precluded forfeiture of Mr. Bennis's interest in the family automobile, let alone his innocent wife's interest. (Pet. Br. 34-36 & n.20; *see also* Inst. Just. Br. 23, 24-25). Finally, it overlooks the traditional limitations regarding equitable remedies in nuisance cases involving owners who had no actual or constructive knowledge of the misuse of their property by another.[4]

B. The "All Reasonable Steps" Standard For Determining Culpability Is Constitutionally Unsound

Although Tina Bennis contends that she should prevail under the "all reasonable steps" standard for determining culpability in the context of civil forfeiture (Pet. Br. 27-28), she urges this Court to adopt the negligent entrustment standard suggested by the Court's historical analysis in *Austin* to ensure that property rights are protected from arbitrary deprivation by the State. The United States acknowledges what the *Austin* Court made clear

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[4] At common law, where a property owner had no knowledge of a misuse of his property, courts refrained from issuing injunctive relief against that owner. Thus, in *People ex rel. Dougherty v. Holschuh*, 209 N.W. 158, 160 (Mich. 1926), the Michigan Supreme Court stated that the traditional equitable power of a court (as distinct from powers purportedly granted by the Michigan nuisance abatement statute) to enjoin a landlord from use of his property, was limited to situations "in which *the owner knew, or within reason should have known, of [the] unlawful use.*" (emphasis added). The Michigan Supreme Court in *Holschuh* accordingly upheld the lower court's refusal to issue an injunction closing a landlord's building for one year, even though that remedy was sought by the prosecutor and was mandated by a provision of the Michigan nuisance abatement statute. *Id.*

(Pet. Br. 16 & n.8), which is that the "all reasonable steps" standard is intended to embody a "reasonable care" or negligence concept. (U.S. Br. 26). Yet because of the standard's vagueness – and because it does not require courts to take account of the relationship between actual or constructive knowledge of misuse and a duty to take preventive measures – courts have too often applied that standard so as to permit a forfeiture in the absence of fault. (Pet. Br. 25-26 & n.15).

The United States' brief not only fails to address the potential for arbitrary applications of the "all reasonable steps" standard, but actually adopts a position with respect to Tina Bennis that illustrates the standard's defects. The circumstances of this case establish that Tina Bennis is blameless in connection with her husband's illegal use of the Bennis automobile. The State conceded that she had no *knowledge* of the illegal use, and her testimony likewise demonstrated that she had no *reason to know* of the illegal use. (Pet. Br. 26-27). Yet the United States contends that Tina Bennis's property should be forfeited because she did not prove at trial that she took "all reasonable steps" to prevent her husband from having illicit sex in the car.[5] (U.S. Br. 25-26). But what

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[5] The United States also argues that Tina Bennis's constitutional claim should fail because she did not properly plead it. (U.S. Br. 25-26). That argument hardly merits consideration by this Court. In a motion for summary judgment filed prior to submission of her answer, Tina Bennis alleged, *inter alia*, that "the seizure of the vehicle constituted a violation of . . . the U.S. . . . Constitution[ ], in that . . . the seizure constituted . . . an improper deprivation of property without due process of law; and an improper taking of property without just compensation." (Mot. Sum. Judg. 4). She pled as an affirmative defense that the State of Michigan had failed to allege "that Defendant Tina Bennis had any knowledge of the alleged nuisance . . . ." (Answer 3). Under ordinary notice pleading rules, that

reasonable measures should she have undertaken given her lack of knowledge or reason to know of the misuse that occurred? Without suggesting even a single "reasonable step" that Tina Bennis failed to take to ensure her husband's marital fidelity, the United States argues that forfeiture is appropriate under that standard.

The United States also appears to argue that Tina Bennis should lose her property because she is no more "innocent" than the yacht leasing company in *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974). Thus, the United States, noting that marijuana was discovered on the boat more than a year after the lessee took possession, states that "there is no suggestion [in *Calero-Toledo*] that the yacht owner acted negligently in entrusting the yacht to the lessees." (U.S. Br. 26). The United States also acknowledges that, following transfer of possession of the yacht to the lessees, the company "presumably had limited means, as a practical matter, of preventing the illegal use of its yacht." (U.S. Br. 28). But as petitioner argued in her principal brief, the Court in *Calero-Toledo* declined on procedural grounds to decide whether the yacht leasing company did or did not satisfy the "all reasonable steps" standard, and *Calero-Toledo* therefore offers no guidance on how the standard is to be applied. (Pet. Br. 24 n.14). For that reason, any suggestion that, because the yacht leasing company failed to satisfy the "all reasonable steps" standard, Tina Bennis must also lose under that standard rests on a faulty

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affirmative defense embraced both "actual" and "constructive" knowledge. In addition, she introduced, without objection, evidence regarding the absence of both "actual" and "constructive" knowledge of her husband's misuse of the car.

premise. In addition, the United States' suggestion that the yacht leasing company should have forfeited its property under the "all reasonable steps standard" again reveals the deficiencies of that standard as a means for measuring culpability. If, as the United States assumes, there was no negligence by the company in leasing the yacht to the individuals who subsequently brought marijuana on board, and if the company had only "limited means, as a practical matter," of preventing that occurrence after the lessees took possession, then what possible fault can be ascribed to the yacht company?

As the United States would apply the "all reasonable steps" test to Tina Bennis and to the yacht company in *Calero-Toledo*, the standard does not measure an owner's negligence, but instead makes the owner a guarantor for the behavior of the person who misuses the property. Because its vagueness invites such applications, the "all reasonable steps" standard should not be made the basis of any constitutional rule protecting the rights of innocent owners.

C. The Negligent Entrustment Standard Proposed By Petitioner Better Accommodates The Need To Protect Property Rights From Arbitrary Deprivation By The Government

Petitioner argues that the common law negligent entrustment doctrine, which is codified in § 308 of the Restatement (2d) of the Law of Torts, offers a fairer, clearer, and more realistic standard than "all reasonable steps" for determining the degree of culpability that is constitutionally required before the "punishment" of forfeiture may be imposed. (Pet. Br. 25-26). Fault under the negligent entrustment standard is ascertained according to whether a person had actual or constructive knowledge that his property was likely to be misused and

according to whether he exercised meaningful "control" over that property. As compared to the "all reasonable steps" standard, this rule for determining culpability would better serve two values that are vital to our legal and constitutional tradition: 1) the historic importance of property rights and the need to secure them from arbitrary deprivation (or deprivation without compensation) by the State; and 2) the fundamental principle that the State should not impose punitive sanctions on a citizen in the absence of personal culpability (in the form of a blameworthy act or omission). Moreover, the negligent entrustment test would serve one of the principal justifications offered by the United States for forfeiting property of owners who have no direct complicity in the illegal use of their property – namely, ensuring that owners do not collude with others in the misuse of their property. (U.S. Br. 13).[6]

Although both of the *amicus* briefs filed in support of the State of Michigan acknowledge the interdependency

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[6] The statutory protection for innocent owners in the federal drug forfeiture statute, 21 U.S.C. § 881, is at least as broad as a constitutional protection based on lack of actual and constructive knowledge would be. The innocent owner defense in § 881(a) provides that property shall not be forfeited for acts or omissions established by the owner to have been committed or omitted "without the knowledge or consent of the owner," 21 U.S.C. § 881(a)(6) and § 881(a)(7), or "without the knowledge, consent, or wilful blindness of the owner," 21 U.S.C. § 881(a)(4)(C). The statutory protection would be broader in two respects. First, under the most common definitions of wilful blindness, *see, e.g., United States v. One 1973 Rolls Royce*, 43 F.3d 794, 807-08 (3d Cir. 1994), lack of wilful blindness is more easily demonstrated than lack of constructive knowledge. Second, under the prevailing interpretation of the statutory defense, an owner *with* knowledge can still qualify for the defense, so long as she can prove lack of consent. *Id.* at 812, 816-17.

between knowledge of an illegal use and the existence of a duty to take all reasonable measures to prevent it,[7] both briefs oppose the use of the negligent entrustment standard. The United States argues that under the *Calero-Toledo* dicta, "lack of knowledge, *or reason to know*, of the illegal conduct that caused the forfeiture, and lack of participation in that conduct" are not sufficient to protect an owner from forfeiture. (U.S. Br. 13) (emphasis added). Thus, it opposes a standard which, *inter alia*, makes the absence of "constructive knowledge" determinative. But, contrary to the United States' paraphrasing of the *Calero-Toledo* dicta, the dicta is actually silent on the effect of a lack of constructive knowledge. And inasmuch as the *Calero-Toledo* standard is, at bottom, a negligence standard (Pet. Br. 16), the use of the constructive knowledge element is entirely consistent with the standard.

The United States also argues that the negligent entrustment standard departs from the *Calero-Toledo* dicta by focusing solely on whether reasonable care was exercised at the time of entrustment, and failing to consider the exercise of reasonable care after entrustment. (U.S. Br. 26-27). In fact, the policy justifications offered by the Court in *Calero-Toledo* for forfeiting the property of persons who have no direct complicity in its misuse indicate that events prior to transfer are those which should be examined to determine whether "reasonable care" has

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[7] The United States concedes that "[i]t may be true in many cases that a spouse who lacks reason to know that the other spouse will use jointly owned property illegally cannot reasonably be expected to take any precautions." (U.S. Br. 29). And the amicus brief of the American Alliance acknowledges that "an uninvolved co-owner would have to know of the specific illegal use in order to take reasonable steps to prevent it." (A.A.R.R. Br. 19).

been exercised. The purpose of forfeiture in those circumstances, the Court said, is to "induc[e] [owners] to exercise greater care in transferring possession of their property." 416 U.S. at 688. Determining whether there has been negligence at that time merely recognizes that in most cases after property is entrusted, the owner has "limited means, as a practical matter, of preventing the illegal use [of her property]. . . . " (U.S. Br. 28).

The United States nevertheless suggests that, even where a property owner (such as a lessor of boats or airplanes) "lacks reason to know" of, say, illegal drug activity, the law may require the lessor to "monitor the activities" of lessees to determine whether they are using his property to facilitate unlawful acts. (U.S. Br. 29). But the imposition by government of "affirmative law enforcement obligations on private parties" runs counter to our Anglo-American legal tradition. (Inst. Just. Br. 17). Thus, the crime of misprision of a felony – the offense of failing to report a felony that one acquires knowledge of – has no "meaningful existence" in this country, and there is doubt that it ever became part of the American common law. W. Lafave and A. Scott, *Criminal Law* 600 (1986); *see also Marbury v. Brooks*, 20 U.S. (7 Wheat.) 556, 575-76 (1822) (stating that a law which would punish a person for failing to "accuse every offender, and to proclaim every offense which comes to his knowledge" is "too harsh for man").[8] Moreover, detection of crime by

[8] Some courts use the "all reasonable steps" test to determine whether an owner *with* knowledge of an illegal use may still qualify for the "innocent owner" defense (*see* note 6, *supra*) in the federal drug forfeiture statute. *See, e.g., United States v. 141st Street Corp.*, 911 F.2d 870, 879 (2d Cir. 1990) (defining "consent" to mean "the failure to take all reasonable steps to prevent illicit use of [property] once one acquires knowledge of that use"), *cert. denied*, 498 U.S. 1109 (1991). One court has endorsed the view that persons who acquire such knowledge should not be required to "take heroic personal risks" to avoid forfeiture of their property. *United States v. 171-02 Liberty Ave.*, 710 F. Supp. 46, 51 (E.D. N.Y. 1989). Others have imposed significant duties to take affirmative steps on such owners. *See, e.g., United States v. Sixty Acres in Etowah County*, 930 F.2d 857 (11th Cir. 1991) (reversing district court and ordering forfeiture of wife's house based on finding that wife "consented" to illegal drug sales by husband, despite district court's finding that wife was "physically and mentally incapable of stopping [husband's] illegal drug activities or of reporting him to the authorities" because, *inter alia*, husband had threatened to kill wife and had murdered his previous wife by beating her to death), *rehearing, en banc, denied*, 952 F.2d 413 (11th Cir. 1991).

"monitor[ing] the activities" of others is not only difficult (*See* Amer. Bank. Ass. Br. 6-7), but also can expose a property owner to personal danger or to liability (e.g., for invasion of privacy). (Inst. Just. Br. 17; Amer. Bank. Ass. Br. 7-8).

Focusing on the time the property is entrusted would also alleviate the concern of the other *amicus curiae* that, because the "control" or "consent"[9] requirement of Restatement § 308 would not be satisfied in many spousal co-ownership situations, the negligent entrustment rule would on that basis alone "effectively preclude many states from subjecting much co-owned property to forfeiture." (A.A.R.R. Br. 20). Specifically, the American Alliance contends that the "control" requirement would frequently not be met because one spouse normally does not need to obtain the other spouse's consent before using jointly owned property. But that is only the case if

[9] The comment to section 308 indicates that property is under a person's "control" if a third person is entitled to use the property only by her consent, and she "has reason to believe that by withholding consent" she can prevent the third person from using the property. Restatement (2d) of the Law of Torts, § 308, comment a (1965).

"control" is ascertained at some time after the creation of the joint property interest. If the "control" requirement is determined as of the time the joint property interest is created, the "control" element would presumably be satisfied in most cases.[10]

D. The Burden Of Proof As To Owner Culpability Should Remain With The State

The ground advanced by the United States for affirmance of the Michigan Supreme Court opinion upholding the constitutionality of the forfeiture of Tina Bennis's property is completely dependent on the assumption that she had the burden of proving lack of culpability. The United States acknowledges that "it may be true in many

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[10] In addition to arguing against the negligent entrustment standard, the United States argues that forfeitures can be effected in the absence of fault if the relationship between the owner and the person who misused the property is one for which common law vicarious tort liability would traditionally lie. (U.S. Br. 20). In that event, the United States argues, the acts and mental state of the wrongdoer can be imputed to an owner regardless of fault. (*Id.*). In support, the United States cites to *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 14-15 (1991), in which the Court rejected, *inter alia*, a substantive due process challenge to the assessment of punitive damages against a corporation for the fraud of employees acting within the scope of their employment. Because *Pacific Mutual* involved vicarious liability in the context of litigation between private parties – and not a civil action brought by the State to confiscate property – reliance on that case to justify forfeitures based on traditional vicarious tort liability is misplaced. Courts have frequently been reluctant to justify forfeitures where the owner of the property and the person misusing it have a relationship for which vicarious tort liability would ordinarily be applicable. *See United States v. One Parcel of Real Estate*, 852 F. Supp. 1013, 1039-40 (S.D. Fla. 1994) (discussing cases), *amended*, 864 F. Supp. 1267 (S.D. Fla. 1994).

cases that a spouse who lacks reason to know that the other spouse will use jointly owned property illegally cannot reasonably be expected to take any precautions." (U.S. Br. 29). But the United States makes the conclusory assertion that the forfeiture in this case should be upheld because Tina Bennis failed to prove either 1) "that she lacked reason to know that her husband would use their car illegally," or 2) "that she took all reasonable steps to prevent such use." (U.S. Br. 25-26).

1. Even If Tina Bennis Had The Burden Of Proving Lack Of Culpability, She Met That Burden Here

Even assuming *arguendo* that Tina Bennis had the burden of proving lack of culpability, her unrebutted testimony at trial established both of the above propositions. Tina Bennis testified that she had no knowledge of her husband soliciting prostitutes. (J.A. 9). Respondent credited this testimony by conceding that "the lower court transcript did not show knowledge on the part of Mrs. Bennis. . . ." (Pet. Br. 26) (quoting from respondent's brief in the Michigan Supreme Court). Besides demonstrating Tina Bennis's lack of actual knowledge of the specific misuse for which Mr. Bennis was charged, this testimony – and her testimony that, on the day he was arrested, she believed he was going to come home directly from work, and that he had never failed to come home from work before – establish that Tina Bennis had no reason to know of the illegal use. (J.A. 9, 11-12). Her lack of actual and constructive knowledge therefore establishes that there were no "reasonable steps" she could have taken to prevent the illegal use, which is consistent with the failure of the State and either of the *amici* to suggest even a single "reasonable step" that she failed to take. Because there were no such steps in the

circumstances of this case, Tina Bennis necessarily satisfied her burden on this issue, if indeed it was her burden.

The United States' sole basis for contending that Tina Bennis failed to establish lack of constructive knowledge is a "security guard's testimony that he had seen Mr. Bennis soliciting prostitutes in the neighborhood of the arrest on two prior occasions." (U.S. Br. 25 n.15). Even if this is what the security guard had testified to,[11] the State has already credited Tina Bennis' denial that she had any knowledge of her husband soliciting prostitutes, which would negate any knowledge of such events. Since activity of this kind is something a husband would want to keep secret, her lack of knowledge is completely understandable.

The United States then argues that, even assuming Tina Bennis lacked actual or constructive knowledge, there still existed "reasonable steps" she could have taken to prevent the illegal use. (U.S. Br. 29). Avoiding any discussion of reasonable steps that might have been taken in *this* factual context, the United States then discusses lessor-lessee contexts in which the lessor's reasonable step would consist of "monitoring the activities" of his lessee. (U.S. Br. 29). But the United States does not suggest by what means Tina Bennis should have monitored her husband's activities and why it would be reasonable to require a wife to do so in these circumstances.

Although petitioner would prevail even if she had the burden of proving lack of culpability under either standard, she does ask the Court to reach the burden allocation issue in connection with her facial challenge to

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[11] The testimony was far more equivocal than the United States characterizes it. The security guard acknowledged on cross-examination that he had never seen Mr. Bennis "engaged in an act of solicitation." (Tr. 150).

the statute because it is inextricably related to the issue of the substantive standard for culpability necessary to justify a forfeiture. (*See* Pet. Br. 37). The fact that, in the view of the United States, the allocation of the burden is determinative of the outcome of this case demonstrates just how inseparable the issues of the substantive standard for culpability and the appropriate allocation of the burden of proof truly are.[12]

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[12] The United States argues in a footnote that "[p]etitioner did not argue in the courts below or in her petition for a writ of certiorari that the State bore the burden of proof on the innocent owner issue." (U.S. Br. 22, n.12). That statement is erroneous. In her petition for certiorari, petitioner argued that the burden of proof should remain with the prosecutor, despite the fact that the *Calero-Toledo* dicta had assigned the burden to the owner. (Pet. Cert. 17, n.15) And in the proceedings below, petitioner took the position that the State had the burden of proving both that she had "knowledge" and that she "allowed" the vehicle to be used improperly. Thus, petitioner stated in her answer to the complaint that the State "ha[d] failed to plead any facts or allegations that Defendant Tina Bennis had any knowledge of the alleged nuisance. . . . " (Answer 3). In her motion for summary disposition, she argued that "Plaintiff has failed to state a claim on which relief can be granted" because, *inter alia*, "no allegations have been made that either of the Defendants has *allowed* the vehicle to repeatedly be used for illegal purposes. . . . " (Mot. Sum. Judg. 3-4) (emphasis added). But even if the burden allocation issue had not been raised, the United States has itself raised the issue by arguing in its *amicus* brief that petitioner failed to satisfy her burden. The argument now made by the United States was neither made below by the State of Michigan nor relied upon by the Michigan Supreme Court as a ground for its decision. Petitioner acknowledges that it is appropriate for the Court to consider the new argument for affirmance being offered by the United States. But the United States can hardly offer a new ground for affirmance of the lower court decision, and then attempt to preclude arguments in opposition to that ground on the basis that they were not raised below.

2. Procedural Due Process Requires Placement Of The Burden Of Proving Culpability On The State In Forfeiture Cases

Neither the United States nor the State of Michigan provide any real challenge to the application of the three-part test of *Mathews v. Eldridge*, 424 U.S. 319 (1976) to determine who should bear the burden with respect to whatever substantive standard for culpability is established by the Court. (Pet. Br. 39-44). The United States asserts only that the *Mathews* test "does not assist her" because it "is . . . entirely reasonable to burden the party more likely to have information relevant to the facts . . . to demonstrate th[ose] facts. . . . " (U.S. Br. 24) (citing *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust*, 113 S. Ct. 2264, 2281 (1993) (relying on W. Bailey, *Onus Probandi* 1 (1886)).[13]

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[13] The *Onus Probandi* treatise relied upon by *Concrete Pipe* does not support the United States' argument regarding the appropriate burden allocation in this case. Discussing burdens of persuasion in the specific context of nuisance actions, the treatise states that "[i]f the nuisance be predicated upon acts of non-feasance, the facts creating the duty must be proved, and the defendant's neglect established." W. Bailey, *Onus Probandi* 234 (1886). Consistent with that common law burden allocation, a number of Michigan cases preceding the Michigan Supreme Court's decision in this case had disregarded the language of the nuisance abatement statute and held not only that knowledge of the misuse was required, but also that the State had the burden of proving such knowledge. *See e.g., State ex rel. Patterson v. Motorama Motel Corp.*, 307 N.W.2d 349, 351-52 (Mich. Ct. App. 1981) (Prosecutor's complaint dismissed because of "fail[ure] to allege . . . knowledge, consent or acquiescence"); *State ex rel. Wayne County Prosecuting Attorney v. Levenburg*, 280 N.W.2d 810, 811 n.1 (Mich. 1979) ("judgment for abatement . . . cannot be rendered without a finding of knowledge . . . on the part of the owners or operators of the place found to be a

The argument of the United States ignores the onerous difficulties faced by an owner who bears the burden of proof under either a negligent entrustment or "all reasonable steps" standard for culpability. Generally, a person who wishes to prove lack of actual knowledge of an illegal use will do so by denying such knowledge, which may or may not be believed. Proving lack of *reason to know* of an impending illegal use is even more problematic. Essentially, it requires an owner like Tina Bennis to reconstruct moments of her life preceding the transfer of property and recollect those facts she became aware of that might overcome the presumption of a guilty state of mind. The number of facts is potentially limitless and may extend well back in time. And because the government has no obligation to allege that the owner knew of specific facts that should have put her on notice, she is left to guess the facts for which she must disprove knowledge in order to make out a defense. In most cases, the owner can do little more than deny knowledge of such facts. The United States apparently regards Tina Bennis's denial that she had any knowledge of her husband soliciting prostitutes as insufficient to establish lack of constructive knowledge. (U.S. Br. 25, n.15). But what else besides this denial can she offer to prove her lack of knowledge of such activity?

The same kinds of difficulties confront an owner who is required to prove that she "took all reasonable steps" to prevent misuse, because what is "reasonable" depends on what she knew or should have known. And where, as here, the government cannot (or will not) even identify any reasonable steps the owner should have taken, placing the burden on owners would require them to guess

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nuisance and their acquiescence in those activities"); J.A. 32 (Michigan Court of Appeals decision in *Bennis*).

what it is they must prove in order to establish innocent owner status.

In her principal brief, petitioner argued that, regardless of who should constitutionally bear the burden of proving owner culpability in *in rem* forfeitures of the kind involved in *Calero-Toledo*, at the very least the Court should place that burden on the State in an *in personam* forfeiture. (Pet. Br. 39 and 45 n.25). The United States responds by suggesting that forfeiture proceedings can be brought *in rem* or *in personam* interchangeably, and that there are no distinctions of any constitutional significance between the two types of proceedings with respect to where the burden of proof should lie. (U.S. Br. 23). Petitioner was simply acknowledging the historical precedent for the burden shift in *in rem* actions and suggesting that, whatever relevance that history might have to the constitutionality of burden-shifting in *in rem* proceedings, it could not support the burden shift in *in personam* proceedings, where there is no such historical precedent. (Pet. Br. 45 n.25).[14] If this Court agrees with the United States that the historical distinctions between those proceedings are of no constitutional import, and also agrees with the due process analysis conducted by petitioner, then this would mean that the Court would be justified in ruling that the burden of proof must lie with the State in either of the two types of forfeiture proceedings.[15]

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[14] *See Austin*, 113 S. Ct. at 2814 (Scalia, J., concurring) (noting the "common law distinctions" between *in rem* and *in personam* forfeitures, including the "burden of proof").

[15] The Court has not addressed the burden of proof issue in forfeiture proceedings in many years, and its nineteenth century decisions on that issue are somewhat difficult to reconcile with one another. In an early decision, *United States v. The Brig Burdett*, 34 U.S. (9 Pet.) 682, 689 (1835), the Court, characterizing the forfeiture proceeding as "highly penal," actually required that

The United States next points out that all of the federal courts of appeal to consider the issue have rejected due process challenges to the burden of proof allocation in the federal drug forfeiture statute, 21 U.S.C. § 881, which simply incorporates the burden allocation for customs matters. (U.S. Br. 23 & n.13). It argues that if the statutory burden of proof allocation under § 881 is constitutional, then the burden of proof for any constitutional protection from forfeiture should also remain with the owner. But all of the federal circuit cases cited by the United States were decided prior to this Court's decision in *Austin*, and their holdings have, at the very least, been seriously undermined by that decision.[16] *Austin* made

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the illegal acts for which forfeiture was sought be "established beyond a reasonable doubt." *Lilienthal's Tobacco v. United States*, 97 U.S. 237 (1878) is the last decision of this Court to have ruled on the burden of proof issue in a forfeiture context. In *Lilienthal's*, an *in rem* forfeiture proceeding initiated for failure to pay federal tobacco taxes, the Court distinguished *The Brig Burdett* and held that the government bore the burden of proving by a preponderance of the evidence the allegations giving rise to the forfeiture. 97 U.S. at 266, 271-72; *see also United States v. Regan*, 232 U.S. 37, 49 (1914) (discussing *Lilienthal's* and *The Brig Burdett*).

[16] In recent years, other courts have begun to question the propriety of the burden shift in § 881. *See, e.g., United States v. Leasehold Interest in 121 Nostrand Ave.*, 760 F. Supp. 1015, 1032 (E.D. N.Y. 1991) ("On constitutional as well as policy grounds there is doubt about the propriety of shifting the burden of proof in quasi-criminal proceedings to leaseholders. . . . The law would be much more comfortable with a forfeiture scheme that, at least in the case of homes, placed the entire burden on the Government to establish that forfeiture is warranted with a standard that is higher than a preponderance."); *United States v. Twelve Thousand, Three Hundred Ninety Dollars*, 956 F.2d 801, 808 (8th Cir. 1992) ("The ease with which title to property may be divested is a constitutional infirmity that cries out for closer

clear that forfeitures effected under § 881(a) are punitive, rather than remedial, in nature. (Pet. Br. 19-20). Yet, in concluding that the burden shift in § 881 did not violate due process, the only two federal court of appeals decisions cited by the United States that analyzed the issue in any depth relied heavily on the contrary view that forfeiture under that section was primarily remedial, rather than punitive, in nature. *See United States v. $2,500 in U.S. Currency*, 689 F.2d 10, 13, 14 (2d Cir. 1982) (stating that § 881(a) serves "broad remedial purposes"; characterizing forfeiture of vehicles as "remedial"; and stating that "any punitive effect is incidental"), *cert. denied*, 465 U.S. 1099 (1984); *United States v. Santoro*, 866 F.2d 1538, 1543 & n.5 (4th Cir. 1989) (stating that "the remedial, non-punitive purposes of 21 U.S.C. § 881 are extremely strong" and that any punitive impact of § 881(a)(7) "is clearly ancillary to the provision's remedial, non-punitive purposes").[17] Moreover, none of the cases cited by the United States employed a *Mathews* due process analysis to determine whether the government should bear the burden of proof.

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scrutiny by this court and the imposition of stricter standards of proof") (Beam, J., dissenting).

[17] Nor can historical considerations be invoked to support the constitutionality of the burden shift in § 881(a). *See United States v. James Daniel Good Real Property*, 114 S. Ct. at 515 (Thomas, J. concurring in part and dissenting in part) (saying that a "strong argument can be made . . . that § 881(a)(7) . . . differs . . . in kind . . . from its historical antecedents") and at 517 (suggesting that § 881 has "all but detached [itself] from the ancient notion of civil forfeiture"). The early *in rem* forfeiture statutes were limited in scope to customs and navigational matters. *See C.J. Hendry Co. v. Moore*, 318 U.S. 133, 152 (1943); Inst. Just. Br. 8-9. They were originally justified by the difficulties in obtaining *in personam* jurisdiction over owners of vessels to satisfy claims against them arising out of violations of customs and maritime law. (*See* Inst. Just. Br. 9-10; Pet. Br. 45 n.25).

In response to Tina Bennis's argument that the quasi-criminal nature of forfeiture proceedings is another factor which supports placing the burden of proving owner negligence on the State, the United States responds with two arguments. First, it states that this argument "is at odds with this Court's consistent refusal to hold that civil forfeiture proceedings are 'subject to the procedural rules governing criminal prosecutions.' " (U.S. Br. 24) (citation omitted). This statement overlooks two modern decisions in which the Court deemed civil forfeiture to be "criminal" for purposes of a constitutional protection that applies to criminal cases. *See United States v. United States Coin & Currency*, 401 U.S. 715, 718 (1971) (Fifth Amendment privilege against self-incrimination applies to forfeiture proceedings because, although "civil in form, [they] are in their nature criminal for Fifth Amendment purposes") (citation omitted) (internal quotation marks omitted); *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 700, 702 (1965) (Because the "object [of a civil forfeiture proceeding], like a criminal proceeding, is to penalize for the commission of an offense against the law," the Fourth Amendment exclusionary rule applies to such proceedings).[18] Second, the United States argues that

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[18] Even where an owner is able to establish innocence under a forfeiture statute that places the burden on him, the costs of doing so can be staggering. In *United States v. One Parcel of Real Estate, supra*, the government sought forfeiture of a 5,000 acre parcel of land after discovering the wreckage of a plane that had crashed on an adjacent parcel of land. Although no drugs were found at the crash site, the government contended that the "intended" landing area for the plane was the defendant property, and that it was to have dropped off a load of cocaine there. 852 F. Supp. at 1019. The District Court concluded after lengthy litigation that the owner of the property "presented essentially undisputed evidence that it had no knowledge whatsoever of any drug trafficking taking place on its property," and that it

even if the proceeding to divest petitioner of her property were criminal in nature, the State would still be permitted to allocate the burden of proof to Tina Bennis on the issue of her guilt or innocence. (U.S. Br. 24). That proposition is fundamentally at odds with settled due process principles. If the State made it a crime to negligently entrust property to another who misuses the property, and punished that crime by requiring forfeiture of the misused property, the State could not, consistent with due process, make the defendant bear the burden of proving that the elements of the offense were not satisfied. *See e.g., Mullaney v. Wilbur*, 421 U.S. 684, 685, 704 (1975) (due process requires that the State prove beyond a reasonable doubt every fact necessary to constitute the crime charged).

The State of Michigan concedes not only that forfeiture under the nuisance abatement act is punishment for criminal wrongdoing, but also that these proceedings are "a prime example of an inexpensive, cost-effective, non-docket-clogging alternative to prosecution and imprisonment." (See Pet. Br. 21) (quoting from respondent's brief in the Michigan Supreme Court proceedings). Presumably the very feature that makes civil forfeiture attractive to the State as an alternative to prosecution is

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"met its burden by proving by more than a preponderance of the evidence that it had no knowledge of any intended use of its property as a landing site for the allegedly drug-laden . . . [airplane] that crashed in early February 1986." *Id.* at 1040. Newspaper accounts of the case indicate that the owner of the property incurred more than $700,000 in legal fees to carry its burden of proof. *See* S. Nesmith, *Family Fights for Reputation, $700,000 in Legal Fees*, Palm Beach Post, Nov. 13, 1994, at 1A. For a discussion of other innocent owners who have been aggrieved by the burden of proof allocation in forfeiture actions, see Note, *Seizure of Third Party's Property Associated with Drug Money: Requiring Third Parties to Become Private Police?*, 23 Sw. U. L. Rev. 79, 88-91 (1993).

that, to date, it has not been subject to most of the constitutional safeguards that apply in criminal cases.[19] As the law now stands, the State, *inter alia*, does not have to provide counsel, it does not have to prove its allegations beyond a reasonable doubt, it can deny the defendant her "confrontation" rights, and (at least in "equitable" proceedings like this one) it does not have to honor a request for a jury trial. (*See* Pet. Cert. 23 n.20). This Court is being asked to continue the trend of its recent forfeiture decisions, which have extended constitutional protections to civil forfeiture proceedings, and hold that the burden of proving culpability in such proceedings lies with the State.

3. The Takings Clause Likewise Requires Placement Of The Burden of Proving Culpability On The State

Relying on this Court's recent takings jurisprudence, petitioner also argues that, because forfeiture involves a direct appropriation of property, the forfeiture is presumptively a taking, and that the government must bear the burden of proving any exception (e.g., owner culpability) to the requirement to pay just compensation. (Pet. Br. 44). The United States counters by citing to two federal court of appeals decisions, one of which suggests that forfeitures do not implicate any takings issues so long as the government's actions comport " 'procedurally

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[19] These procedural advantages also induce defendants to settle forfeiture cases. In oral argument before the Michigan Supreme Court, counsel for respondent implied that owners who are alleged to have committed a nuisance readily pay cash settlements in exchange for return of their vehicles because the proceeding is a "civil matter and we could call them as a witness and they kn[o]w that up front. . . . " (Tr. Or. Arg. 11). *But see United States v. United States Coin and Currency, supra.*

and substantively' " with the provisions of a lawfully enacted forfeiture statute. (U.S. Br. 24-25) (citation omitted). Both of the federal appellate cases pre-date this Court's decisions in *Lucas v. South Carolina Coastal Council, supra,* and *Dolan v. City of Tigard,* 114 S. Ct. 2309 (1994). Petitioner submits that those decisions have established a significantly higher level of judicial scrutiny of direct appropriations of property such as forfeiture than that which is urged by the United States.

To countenance the view that "mere property rights" (J.A. 25) are at stake in civil forfeiture, and that the State is relieved of any burden whatsoever to justify the appropriation of a citizen's property by this device, would relegate the Takings Clause "to the status of a poor relation," *Dolan,* 114 S. Ct. at 2320, with respect to the other constitutional safeguards in the Bill of Rights.

CONCLUSION

For the foregoing reasons and those stated in petitioner's opening brief, it is respectfully submitted that the judgment of the Michigan Supreme Court as to petitioner should be reversed.

Respectfully submitted,

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